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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BOATWORKS, LLC, Plaintiff and Respondent, v. CITY OF ALAMEDA and CITY OF ALAMEDA CITY COUNCIL AS SUCCESSOR AGENCY TO THE COMMUNITY IMPROVEMENT COMMISSION OF THE CITY OF ALAMEDA, Defendants and Appellants.	A150276 (Alameda County Super. Ct. No. RG16-823346)

A strategic lawsuit against public participation (SLAPP) is one "that arises from protected speech or petitioning *and* lacks even minimal merit." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).) A cause of action satisfying both these prongs can be stricken under California's anti-SLAPP statute, section 425.16 of the Code of Civil Procedure. This case involves a property owner seeking to develop residential real estate and suing the public entities that have not sufficiently authorized its development. When defendants brought an anti-SLAPP motion to strike the suit, the trial court denied the motion in substantial part, reasoning that the actions of the public entities did not arise from protected speech or petitioning. With regard to the property owner's contractual claims, we agree.

The trial court also granted the property owner a preliminary injunction that freezes the status quo with regard to regulatory approvals for the proposed development. We conclude that the decision to issue this injunction rests on a misapprehension of the property owner's likelihood of succeeding on its claims, and that no injunction should have issued.

I. FACTS AND PROCEDURAL BACKGROUND

Boatworks, LLC, a family-owned company that is successor in interest to Francis and Catherine Collins (collectively "Boatworks"), has been attempting since 2005 to develop waterfront real estate it owns in the City of Alameda. In October 2010 Boatworks entered into an agreement with the City of Alameda ("City") and its redevelopment agency, the City of Alameda Community Improvement Commission ("CIC"), to settle previous litigation regarding the proposed development. This Settlement Agreement put in place parameters for the City's and CIC's review of a compromise proposal called the "Reduced Density Alternative" (or the "Project"), and it established certain obligations on the parties in the event the City and CIC approved the Project. Shortly after the parties executed this agreement, the state legislature dissolved its redevelopment agencies, and the City of Alameda City Council elected to become CIC's successor agency. (See Health & Saf. Code, § 34192 *et seq*.) We refer to the City and CIC together as "the City Parties," and they are, along with individuals not party to this appeal, the defendants in this action that Boatworks filed in 2016.

A. The Settlement Agreement and the Tentative Map

The October 2010 Settlement Agreement lies at the heart of this case. In the Settlement Agreement, Boatworks undertook "diligently [to] pursue all governmental approvals necessary to develop the Reduced Density Alternative" and, if the City Parties approved the Project, to follow through and develop it. The Reduced Density Alternative comprises 182 housing units, of which 21 are reserved for affordable housing. The Project also includes two acres of open space for a waterfront park. The City Parties, for

their part, undertook in the Settlement Agreement to review in a timely fashion and "approve or disapprove the Reduced Density Applications," and in the event of approval to provide Boatworks with up to $4.4 million in financial assistance for the Project. The money was to come from "site-specific property tax increment revenue allocated and paid to the CIC." In order to ensure this tax money was spent appropriately, Boatworks and the CIC were to enter into "a mutually acceptable Owner Participation Agreement ('OPA')." (See Health & Saf. Code, §§ 33670, subd. (b), 33339.) If Boatworks and the CIC were "unable to agree on terms of a mutually acceptable OPA" by a certain date, the Settlement Agreement would terminate.

At the October 2010 meeting where the City Council approved the Settlement Agreement, the City Parties also took other steps toward realizing the Project. The City Council voted to certify the Environmental Impact Report (EIR), amend the City's General Plan, and rezone the waterfront parcel for residential and open-space uses, all in conformance with the Reduced Density Alternative.

Boatworks then prepared and submitted a tentative map embodying the Reduced Density Alternative ("Tentative Map"). A tentative map is a planning document prepared for a subdivision, normally after a development plan has been approved and a project has undergone design review. A tentative map lays out the precise location of proposed lot lines, streets, and utilities, and establishes the site grading and improvements that are necessary. It is often approved subject to conditions, including for example that a developer procure additional approvals from other agencies with jurisdiction over a project. When a developer has satisfied the conditions in a tentative map, it submits a final subdivision map, and if the final map "is in substantial compliance with the previously approved tentative map," the final map will be approved. (Gov. Code, § 66474.1.)

At its July 19, 2011 meeting, the City Council approved Boatworks's Tentative Map. This approval was subject to numerous conditions, many incorporating terms of

the Settlement Agreement. For example, Condition 10 requires that " 'prior to first final map' " Boatworks complete and execute an Affordable Housing Agreement ("AHA") and an OPA for the Project, both " 'consistent with the Settlement Agreement.' " Other conditions require Boatworks to obtain necessary licenses and permits from the Bay Conservation and Development Commission and the Army Corps of Engineers.

After the Tentative Map was approved and the CIC dissolved, progress slowed. Originally valid for two years, the Tentative Map was automatically extended for two more years by state legislation enacted to address the turmoil caused by the winding down of redevelopment agencies. (Gov. Code, §§ 66452.6, subd. (a)(1), 66452.24.) Then, shortly before the Tentative Map would have expired in July 2015, Boatworks applied to the City for another extension, which the City approved through July 19, 2016. Meanwhile, Boatworks worked to prepare the property and to find a developer that would build the project. Periodically Boatworks communicated with the City Parties about its efforts.

Statements the City Parties made in the course of these communications suggest that through 2014 the City Parties may have considered the Settlement Agreement still in effect. For example, on November 11, 2011, the City's Assistant Community Development Director Andrew Thomas wrote, " 'The City remains committed to the executed 2010 Settlement Agreement and to the 2011 entitlements for 182 units that . . . were approved by the City Council in 2011.' " On September 3, 2013, Andrew Thomas and Boatworks's architect exchanged emails in which they "agreeably discussed finalizing the [OPA] pursuant to the Settlement Agreement." And in September 2014, when Boatworks invoked the Settlement Agreement's dispute resolution procedures to request a meeting with City representatives over an increase in impact fees, the City participated in that meeting without mentioning that they thought the Settlement Agreement had lapsed.

Statements the City Parties made in public filings with the California Department of Finance left the same impression. Every six months since 2012, the City Parties have prepared and filed with the Department of Finance a document called a Recognized Obligations Payment Schedule ("ROPS") that lists, among the enforceable obligations of the former redevelopment agency, an approximately $4.4 million obligation to Boatworks. This represents money the CIC could owe Boatworks under the Settlement Agreement if the property is successfully developed. As the successor agency to the CIC, the City Council was required to report enforceable obligations to the state. (Health & Saf. Code, §§ 34171, subd. (d), 34177.)

B. A Dispute Develops

Boatworks's challenge to the City's increase in development impact fees was not resolved through the parties' discussions, and in November 2014 Boatworks filed another lawsuit against the City challenging those fees. Boatworks attributes to the pendency of that case a change in attitude among City staff toward its development efforts on the Project. The City, for its part, highlights deviations between the previously approved Tentative Map and subsequent Boatworks's filings—filings that reduced the amount of open space and relocated the affordable housing to an area that the Department of Toxic Substances Control had not yet cleared for residential use. In any event, at a June 2015 meeting, the Planning Board followed a staff recommendation and denied Boatworks's 2014 applications for a development plan and amendment to the Tentative Map. Boatworks promptly lost its business partner in the venture and was forced to find another.

In December 2015 Boatworks submitted a new development plan for the property ("2015 Development Plan") that differs in a number of ways from the 2011 Tentative Map. Responding on behalf of the City in a March 8, 2016 letter, Andrew Thomas explained that local ordinances require this plan to have 29 units of affordable housing,

rather than the 21 units approved in the Settlement Agreement and the 2011 Tentative Map.

On March 23, 2016, Boatworks emailed Thomas and City Attorney Janet Kern to ask that they agree in writing, pursuant to Article 2.3 of the Settlement Agreement, that Toll Brothers, Inc., was qualified to develop Boatworks's Project. Kerns wrote back declining the request: "Pursuant to Article 3, Section 3.3.3 (d) of the October 5, 2010 Settlement Agreement . . . the parties currently do not have any rights or obligations under the Settlement Agreement."

The provision of the agreement to which Kerns referred was one that terminated the Settlement Agreement if Boatworks and the CIC were "unable to agree on terms of a mutually acceptable OPA" by a certain date. The Settlement Agreement described the date in ambiguous terms, but the parties place it in either July or December of 2011. As of March 2016, the parties had not executed an OPA, and the record contains little information about what efforts they had made to agree on one's terms. In May 2016, Boatworks executed an OPA that it said complied with the Settlement Agreement, but the City Parties refused to sign on grounds they would not execute an OPA for a nonbinding obligation. Likewise, the City refused to sign—or even discuss—an AHA that Boatworks proposed in June 2016.

This lawsuit ensued. On July 14, 2016, Boatworks filed a verified petition for writ of mandate and complaint ("Complaint") seeking "vindication and protection of" its rights under the Settlement Agreement. The Complaint alleges the following causes of action: (a) breach of contract and breach of the covenant of good faith and fair dealing, based on the City Parties' refusal to cooperate in executing an OPA and an AHA and other acts allegedly inconsistent with their obligations under the Settlement Agreement (collectively, "Contract Claims"); (b) fraud and negligent misrepresentation, based on statements alleged to have led Boatworks to believe the City Parties considered themselves bound by the Settlement Agreement even after 2011; (c) declaratory relief

that the Settlement Agreement remains in effect and that the City's conduct has created a development moratorium necessarily extending the life of the Tentative Map; (d) inverse condemnation based on spot zoning of the open space; (e) intentional interference with contract for allegedly impeding Boatworks's relationships with third parties; and (f) petition for writ of traditional mandate.

C. The SLAPP Motion and Preliminary Injunction

At the outset of litigation, defendants filed a demurrer and an anti-SLAPP motion to strike the Complaint, and Boatworks filed a request for a preliminary injunction. The trial court decided all three motions in a single order, filed November 3, 2016.

The court overruled defendants' demurrer with respect to the Contract Claims and the declaratory relief cause of action, while sustaining it with leave to amend as to most other causes of action. Only with regard to the claim for intentional interference with third-party contract did the trial court sustain the demurrer without leave to amend. No party has appealed these rulings.

Defendants' anti-SLAPP motion also resulted in a split decision. The trial court granted the motion in two narrow respects, dismissing all counts against Andrew Thomas, whom Boatworks had named as an individual defendant, and striking the cause of action for intentional interference with contract. These decisions are not challenged on appeal. As to the remaining causes of action, the trial court denied the anti-SLAPP motion. It said the claims arise from the City Parties' performance of the Settlement Agreement and not from acts " 'in furtherance of the right of petition or free speech.' " (*San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn* (2004) 125 Cal.App.4th 343, 353–358 (*San Ramon*).) The trial court acknowledged that the Complaint alleges in support of its claims certain statements of City employees, and it concluded that these statements were " 'in connection with a public issue' " because they pertain to a city contract. But a city "necessarily operates through the actions and communications of its employees," so evidence of these communications

does not sufficiently establish that the claims arise from the City Parties' protected activities, the trial court reasoned. In short, the trial court decided the motion based on the first prong of the anti-SLAPP analysis, without reaching the second prong—whether Boatworks's claims "lack[] even minimal merit." (*Navellier*, *supra*, 29 Cal.4th at p. 89.)

Finally, the trial court granted Boatworks's motion for a preliminary injunction, ruling that the Tentative Map must remain in effect until further order of the court. It expressed a preliminary view that Boatworks was likely to prevail in enforcing the Settlement Agreement, and it found that while the City Parties had identified no significant harm they would suffer if the Tentative Map remained in effect, Boatworks had demonstrated that allowing the Tentative Map to expire would cause the company significant harm.

The City Parties timely appealed the denial-in-part of their anti-SLAPP motion and the grant of Boatworks's preliminary injunction. Boatworks meanwhile filed an amended complaint that does not reallege fraud or negligent misrepresentation claims.

II. DISCUSSION

A. Anti-SLAPP Motion

a. Preliminary Considerations

We start with the language of California's anti-SLAPP statute: "A cause of action against a person *arising from* any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1), italics added.) The first enquiry is whether Boatworks's claims arise from the City Parties' protected activities. Only where they do must a court address the second issue, whether Boatworks has established a probability it will prevail on those claims.

At the outset, we note that approval of a tentative map and related land use decisions are matters of public interest. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 729 (*Mission Oaks*), disapproved on other grounds by *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn 10.) This means an action challenging a property owner's submission of a development proposal to a local government for approval can be a SLAPP suit (*Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 272), as can an action against a third party for inducing a city government to abandon negotiations with a developer over a project (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1228, 1235). In an appropriate case, even a city or county can be the target of a SLAPP suit related to matters of public interest such as these, as "public entities are 'persons' for the purpose of the anti-SLAPP statute." (*Mission Oaks* at p. 730; *San Ramon, supra,* 125 Cal.App.4th at p. 353.) But the assertion that a public entity's "decision is a matter of public interest does not suffice to bring that decision within the scope of protected activity defined by" the anti-SLAPP statute. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1072 (*Park*).)

The critical issue that remains is whether each of Boatworks's claims arises out of or "is *based on* the defendant's protected free speech or petitioning activity." (*Navellier, supra,* 29 Cal.4th at p. 89.) The trial court found, except in the limited circumstances where it granted the anti-SLAPP motion, that Boatworks's claims were not based on the City Parties' protected speech or petitioning activities, but instead on their performance (or failure to perform) under the Settlement Agreement.

We review this decision de novo. (*Park, supra,* 2 Cal.5th at p. 1067.) In doing so we, like the trial court, will consider the Complaint and affidavits supporting and opposing the motion. (*Navellier, supra,* 29 Cal.4th at p. 89.) Where the evidence conflicts, we accept plaintiff's evidence as true, while evaluating the defendants'

evidence "to determine if it defeats the plaintiff's showing as a matter of law." (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 420 (*Vasquez*).)

b. Contract Claims

Consider first the Contract Claims. At bottom, Boatworks alleges in these causes of action that the City Parties entered into a Settlement Agreement that remains in effect—or that the City Parties led Boatworks to believe remained in effect—and that the City Parties reneged on that Agreement by refusing to negotiate and sign necessary follow-on agreements (the OPA and the AHA), by refusing to process in good faith the approvals necessary for Boatworks to build the Reduced Density Alternative with the benefit of $4.4 million in tax increment financing, and by other actions that expressly or impliedly repudiate the Settlement Agreement.

The fact that these causes of action are framed in contract terms is not dispositive. As the City Parties point out, "conduct alleged to constitute breach of contract may also come within constitutionally protected speech or petitioning. (*Navellier*, *supra*, 29 Cal.4th at p. 92.) It "is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Ibid*.) The statute defines protected speech or petitioning to include "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law." (Code Civ. Proc., § 425.16, subd. (e)(1).)[1] Also, any such statement made "in

[1] According to the statute, an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, … or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in

connection with an issue under consideration or review" in an official proceeding comes within the definition. (Code Civ. Proc., § 425.16, subd. (e)(2).) So, in *Navellier*, where the defendant was being sued for breaching a contract by filing counterclaims in a federal case, our Supreme Court found the action fell "squarely within the ambit of the anti-SLAPP statute's 'arising from' prong." (*Navellier*, *supra*, 29 Cal.4th at p. 90.) A counterclaim "filed in federal district court indisputably is a 'statement or writing made before a . . . judicial proceeding,' " the court found, and is therefore protected activity whether or not it is also activity in breach of the defendant's contractual obligations. (*Id.* at pp. 90–93.) Since the City Parties are being sued, not for filing counterclaims, but for refusing to cooperate in actions necessary to implement the Reduced Density Alternative, the question becomes whether these activities are protected speech or petitioning.

The City Parties urge that *Park* points the way forward in answering that question. In *Park*, an assistant professor denied tenure filed suit alleging discrimination based on national origin. (*Park*, *supra*, 2 Cal.5th at p. 1061.) Defendant the Board of Trustees of the California State University brought an anti-SLAPP motion, arguing that the case "arose from its decision to deny him tenure and the numerous communications that led up to and followed that decision," all of which were protected activities. (*Ibid.*) The Supreme Court disagreed, explaining: "a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Id.* at p. 1060.) In *Park*, the wrong complained of was the tenure decision alleged to have been infected by

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connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e).)

discriminatory animus. (*Id*. at p. 1068.) "The tenure decision may have been communicated orally or in writing, but that communication does not convert Park's suit to one arising from such speech. The dean's alleged comments may supply evidence of animus, but that does not convert the statements themselves into the basis for liability." (*Ibid*.) But because the tenure decision itself is not a protected activity, the anti-SLAPP statute did not extend to Park's case. (*Id*. at p. 1073.)

Park is one of a line of cases that distinguish for anti-SLAPP purposes between government decisions and the statements, votes, and communications that lead to those decisions or are evidence of them. (*Park, supra,* 2 Cal.5th at p. 1064.) For example, in *San Ramon, supra,* 125 Cal.App.4th 343, a fire protection district sued the public entity responsible for setting its pension contribution levels, challenging the decision to increase retirement contribution levels. Defendants filed an anti-SLAPP motion, which failed on the first prong. (*Id*. at p. 353.) As the Court of Appeal explained, "the fact that a complaint alleges that a public entity's action was taken as a result of a majority vote of its constituent members does not mean that the litigation challenging that action *arose from* protected activity, where the measure itself is not an exercise of free speech or petition." (*Id*. at p. 354.) In *San Ramon*, "[t]he action challenged consists of charging the District more for certain pension contributions than the District believes is appropriate. This is not governmental action which is speech-related. By contrast, if the action taken by the Board had been to authorize participation in a campaign to amend state pension laws, or to become actively involved in a voter initiative seeking such changes, then the Board's own exercise of free speech might be implicated. But this is not the case, and this distinguishing feature is dispositive." (*Id*. at p. 357.)

Other cases illustrate this dispositive difference. In *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207 (*Graffiti*), a company that lost its government contract sued the city that awarded the contract to a rival instead. The City's anti-SLAPP motion failed because the wrong complained of was a violation of the laws

regulating competitive bidding; the city's written and oral communications were merely evidentiary—they "assist in telling the story"—but were not themselves the basis for the claims. (*Id*. at p. 1215.) By contrast, *Vargas v. City of Salinas* (2009) 46 Cal.4th 1 (*Vargas*) was a lawsuit aimed squarely at a city's protected activity. (*Id*. at p. 19.) Proponents of an anti-tax initiative sued a city for using public funds " 'to prepare and distribute pamphlets, newsletters and Web site materials' " outlining cuts to services that the initiative would precipitate. (*Id*. at p. 13.) The plaintiffs alleged this conduct violated campaign laws, but the Supreme Court had no difficulty concluding "that the publications and activities of the City … constitute 'protected activity' within the meaning of the first step of the anti-SLAPP analysis." (*Id*. at p. 19; accord *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Assn of Governments* (2008) 167 Cal.App.4th 1229 [association of local government's advocacy for and expenditure in support of ballot measure are protected activity].)

Recently this division considered an anti-SLAPP motion brought by the City of Alameda in a different breach of contract action. (*Area 51 Productions, Inc. v. City of Alameda* (2018) 20 Cal.App.5th 581 (*Area 51*).) Plaintiff was an event-planning company that had long licensed space from the City for events that plaintiff planned and promoted. (*Id*. at pp. 586–587.) The City ceased doing business with plaintiff, leaving plaintiff on the hook with third parties to whom it had made commitments in reliance on communications with the City and the City's property manager. (*Id*. at pp. 587–588.) Plaintiff sued the City on breach of contract and other theories, and the City of Alameda responded with an anti-SLAPP motion to strike. (*Id*. at p. 589.) We affirmed denial of the anti-SLAPP motion on the contract-related claims, reasoning that the injury-producing conduct was, at bottom, a refusal to license plaintiff's events on City property. (*Id*. at pp. 596, 606.) This refusal was not protected activity, and "[t]he communications that led to and that followed" it were, we concluded, "merely incidental to the asserted claims." (*Id*. at pp. 596.)

Following *Area 51* and the rest of the *Park* line of cases, we conclude that the Contract Claims are not based on the City Parties' protected speech or petitioning activity. At bottom, they challenge the City Parties' refusal to process in good faith the approvals necessary to build the Reduced Density Alternative and to preserve the project's tax increment subsidy. The City Parties' refusal to negotiate or sign an OPA or an AHA is—like the City's refusal to license the event planner in *Area 51* or the university's refusal to grant tenure to professor Park—activity beyond the reach of the anti-SLAPP statute. The Planning Board's denial of Boatworks's 2014 applications for a development plan and an amendment to the Tentative Map was—like the public entity's decision in *San Ramon* to charge the fire district more for certain pension contributions than the district thought appropriate—also not protected activity.

To be sure, the Complaint is replete with statements and communications attributed to the City Parties. In a breach of contract case, it is hard to imagine this could be otherwise. Boatworks's Contract Claims rely on the City Parties' statements as evidence that a contract was formed and remains enforceable. Andrew Thomas's emails of November 11, 2011 and September 3, 2013 and the semi-annual ROPS filings that list Boatworks's tax-increment subsidy as enforceable obligations are examples of such statements. Boatworks also cites communications such as those from attorney Kerns as evidence that the City is repudiating this contract. But all of these statements, whether they go to the contract's formation or its repudiation, are incidental to the wrong of which Boatworks complains, which is the City Parties' failure to approve its development plans and put in place agreements as required for the tax-increment subsidy. These failures are the alleged breach of contract (or breach of the covenant of good faith and fair dealing), and they are not acts in furtherance of the City Parties' rights of petition or free speech. Boatworks's challenge bottomed on these failures is accordingly not a SLAPP suit. (Code Civ. Proc., § 425.16, subd. (b).)

The City Parties protest this characterization of Boatworks's claims with two lines of attack. In their opening brief, they argue that none of the alleged breaches caused injury to Boatworks because each "was rendered moot by the City's other discretionary determinations on Boatworks's applications for development." For example, Boatworks was not injured by the City's failure to sign an AHA, they argue, because no agreement on affordable housing was necessary until Boatworks submitted a development plan matching its 2011 Tentative Map. This logic leads the City Parties to characterize "Boatworks's true injury" as the "denial of permits or the imposition of conditions" on those permits, an injury said to "arise from the process of governance itself." This is essentially a defense of the case on its merits. Important for present purposes is that Boatworks's injury so characterized also does not arise from protected activity. As with the decision to raise retirement contribution levels that the fire district challenged in *San Ramon*, so with regard to any decision on Boatworks's permit applications, "there is nothing about that decision, qua governmental action, that implicates the exercise of free speech or petition." (*San Ramon, supra,* 125 Cal.App.4th at p. 355.) Litigation challenging a governmental decision does not arise from protected activity where, as here, the decision "itself is not an exercise of free speech or petition." (*Id*. at p. 354.)

In their reply brief, the City Parties change course. Attempting to distinguish *Park, San Ramon,* and *Graffiti,* they argue that this case, unlike those, is "not a challenge to the government's ultimate decision" but only to the process whereby that decision is made. They point out that "the Settlement Agreement could not and did not require a specific" decision on Boatworks's proposal but "only a good faith process," and also that Boatworks filed this case before the City Council had voted on its 2016 requests for approval. The City Parties understate the consequences of their own actions. They declined to negotiate or sign the AHA and OPA that Boatworks alleges is necessary to unlock $4.4 million in tax-increment financing. They refused to certify Toll Brothers as qualified to develop the Project. And the Planning Board denied Boatworks's 2015

applications for a development plan and an amendment to the Tentative Map. Boatworks alleges injury as a result of these decisions, which brings its case into line with *Park, San Ramon*, and *Graffiti*. The fact that the City Parties could in the future make additional decisions that might (or might not) mitigate the alleged harm does not change the anti-SLAPP analysis. Boatworks has challenged actual government decisions as causing harm, not just statements and communications that evidence a deliberative process that has yet to bear fruit.

c. Other Claims

The City Parties correctly argue that in deciding an anti-SLAPP motion the court must analyze the activity underlying each of Boatworks's claims separately. (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1478; *Park*, *supra*, 2 Cal.5th at p. 1063 [court must analyze "the elements of the challenged claim and what actions by the defendant supply those elements"].) Their briefing addresses, in addition to the Contract Claims, Boatworks's claims for fraud and negligent misrepresentation. But as to those, because the trial court sustained the demurrer and Boatworks did not replead them when amending its complaint, the anti-SLAPP motion is moot except as it bears on the City Parties' request for attorney's fees. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1365; *Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 879.) Because the City Parties have requested such fees, we briefly explain why the trial court erred in denying, on the first prong of the anti-SLAPP analysis, the motion to strike the fraud and negligent misrepresentation claims.

Fraud and misrepresentation are primarily speech-based claims, where injury results from detrimental reliance on a speaker's false statements. (Civ. Code, §§ 1709, 1710.) Boatworks's fraud and negligent misrepresentation claims allege that the City Parties lured and lulled Boatworks into mistakenly believing the City Parties considered the Settlement Agreement binding after July 2011. Specifically, Boatworks claims it relied to its detriment on the following: (a) ROPS filings from 2012 to the present listing

the Settlement Agreement as an enforceable obligation, (b) conditions of approval incorporated in July 2011 into the Tentative Map that expressly refer to the Settlement Agreement (e.g., requiring an OPA "consistent with the Settlement Agreement"), and (c) the City Parties' 2014 participation in dispute resolution under the Settlement Agreement without any objection that the Settlement Agreement was no longer in force. The City Parties made these false representations—and concealed their true views about the Settlement Agreement when Boatworks invoked the dispute resolution provision—all with the requisite knowledge and intent, leading Boatworks to rely to its detriment, Boatworks alleges. (See, e.g., *Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 837–845 [elements of intentional fraud, fraud by concealment, and negligent misrepresentation].) These are the City Parties' acts that allegedly give rise to Boatworks's fraud and misrepresentation claims.

With regard to the ROPS filings and the conditions imposed on the Tentative Map, Boatworks's claims go to activity the anti-SLAPP statute protects. First, because these statements are themselves the wrong complained of, the claims may be said to "aris[e] from" the City Parties' statements. (Code Civ. Proc., § 425.16, subd. (b)(1); see *Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 626.) Second, the ROPS filings were speech made "in connection with a public issue," namely the commitment of public funds to support the proposed development project (Code Civ. Proc., § 425.16, subd. (e)(4)), and the conditions imposed on the Tentative Map were statements "made in connection with an issue under consideration" at the City Council meeting where the Tentative Map and its conditions were approved. (Code Civ. Proc., § 425.16, subd. (e)(2).) Both sets of statements are thus protected activity. (See also *Area 51, supra*, 20 Cal.App.5th at p. 601.)

We reach a different conclusion with regard to the City Parties' failure to object when Boatworks invoked the Settlement Agreement as a reason for the parties to sit down and try to settle their disputes. In the context of this case, neither the act of

attending a meeting nor the failure to object to Boatworks's characterization of the meeting is a statement by the City Parties, let alone one protected by the anti-SLAPP statute.

Because the trial court rejected the City Parties' anti-SLAPP motion in its entirety on the first prong, the trial court never directly addressed the issue of whether Boatworks's fraud and misrepresentation claims "lack even minimal merit." (*Navellier*, *supra*, 29 Cal.4th at p. 89.) We will leave that issue to the trial court on remand, to the extent it needs to resolve the issue in deciding any motion for attorney's fees that the City Parties may bring.

B. Preliminary Injunction

A preliminary injunction is necessarily tentative, designed to preserve the status quo pending trial. (*Costa Mesa City Employees Assn. v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 305 (*Costa Mesa*).) Where a plaintiff has presented evidence of irreparable injury that it will suffer if no injunction issues, we "examine two interrelated factors to determine whether the trial court's decision to issue a preliminary injunction should be upheld: '(1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction.' " (*Id.* at p. 306.)

Here, the trial court issued a preliminary injunction requiring that the Tentative Map remain in effect until further order of the court. We review this decision for abuse of discretion, except " '[t]o the extent that the trial court's assessment of likelihood of success on the merits depends on legal rather than factual questions . . . our review is de novo.' " (*Costa Mesa*, *supra*, 209 Cal.App.4th at p. 306.) Because we see potential legal error in the trial court's assessment of Boatworks's likelihood of success on the merits, we must exercise independent review here.

The trial court found "a likelihood that Boatworks will prevail on enforcing the Settlement Agreement," based on evidence that the City Parties "considered the

Settlement to be in effect through early 2016." This means the trial court accepted as potentially meritorious Boatworks's argument that the City Parties were "equitably estopped from arguing that the contract expired in 2011."

Equitable estoppel generally requires proof of the following four elements: (1) the party to be estopped is apprised of the facts; (2) the party to be estopped intends that its conduct be acted upon, or so acts that the party asserting estoppel had a right to believe the conduct was so intended; (3) the party asserting estoppel was ignorant of the true state of facts; and (4) the party asserting estoppel relied upon the conduct to its injury. (*HPT IHG-2 Properties Trust v. City of Anaheim* (2015) 243 Cal.App.4th 188, 201 (*HPT*).) For example, in *HPT* the City of Anaheim granted a conditional use permit for a project to develop hotels and associated parking, and after the property owner relied on the permit to build the project, the city adopted and sought to rely on a new and supervening permit. (*Id*. at p. 191.) *HPT* held that the city was equitably estopped from doing so and the new permit was appropriately set aside. (*Id*. at p. 210.)

Despite the superficial similarities between *HPT* and this case, *HPT* does not support Boatworks's estoppel argument. Boatworks is not arguing that the City Parties, having adopted the Settlement Agreement and the Tentative Map, are equitably estopped from adopting new or different permitting requirements. Instead, Boatworks is arguing that because of their conduct and statements from 2011 to 2016 the City Parties are estopped from taking the position that the Settlement Agreement is no longer in effect. In attempting to circumscribe the City Parties' litigation position, Boatworks is urging something akin to judicial estoppel without using that term or addressing the contours of that doctrine.[2] But in the absence of judicial estoppel we see no reason why the City

[2] Judicial estoppel prevents a party from asserting inconsistent positions in legal proceedings (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181), but the doctrine does not apply here because there is no evidence that the City Parties have

Parties, like Boatworks, are not free to take any position before this court that the law and the facts support, and all parties have taken the position that the Settlement Agreement, by its terms, expired in 2011.

The conduct of the City Parties between 2011 and 2016 may have led Boatworks to believe *that the City Parties believed* that the Settlement Agreement was still in effect, but that fact (if established) has no bearing on whether the Settlement Agreement actually remains in force. Boatworks had full access to the facts that determine that issue. Thus, the third element necessary to equitably estop the City Parties from enforcing the Settlement Agreement—Boatworks's "ignoran[ce] of the true state of facts"—is missing (*HPT, supra,* 243 Cal.App.4th at p. 201), and Boatworks has not shown a likelihood of success in enforcing the Settlement Agreement.

In deciding whether to issue a preliminary injunction, a "trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 677–678.) But " '[a] trial court may not grant a preliminary injunction regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim.' " (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1463.) Here, Boatworks has not established that it can prevail on the merits of its equitable estoppel claim, and it is therefore not entitled, on this record, to a preliminary injunction.

III. DISPOSITION

The trial court's order denying the City Parties' anti-SLAPP motion is AFFIRMED, except that with regard to the fraud and negligent misrepresentation claims

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argued in any other legal forum that the Settlement Agreement continued in effect after 2011.

it is REVERSED to the extent not moot. The order granting a preliminary injunction is REVERSED. All parties shall pay their own costs on appeal.

_____
Tucher, J.

We concur:

_____
Streeter, Acting P.J.

_____
Lee, J.[*]

[*] Judge of the Superior Court of California, City and County of San Mateo, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.